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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 152

NEWTON W. LUMBRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 332–335) is reported in 63 F. (2d) 796.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 14, 1933 (R. 336). The petition for a writ of certiorari was filed June 9, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below, in reversing the judgment of the District Court, erred in holding that there was no substantial evidence to sustain the finding of the jury that petitioner became permanently and totally disabled on May 31, 1919, so as to be entitled to recover under a policy of war-risk insurance.

STATUTE AND REGULATION INVOLVED

Section 400 of the Act of October 6, 1917, c. 105, 40 Stat. 398, 409, provides as follows:

> That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the Bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided.

This section was restated in Section 300 of the Act of June 7, 1924, c. 320, 43 Stat. 624, amended by Section 12 of the Act of March 4, 1925, c. 553, 43 Stat. 1308 (U.S.C., Title 38, Sec. 511).

Treasury Decision 20 War Risk, of March 9, 1918, defined permanent and total disability as follows:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.
>
> "Total disability" shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.

STATEMENT

The petitioner brought suit in the District Court for Vermont to recover the proceeds of a policy of war-risk insurance, alleging that he was permanently and totally disabled on April 29, 1919, while the policy was in force (R. 2–5). The case was tried before the court with a jury (R. 11). At the close of the evidence the defendant moved for a directed verdict, which was overruled, and the jury rendered a verdict for the plaintiff (R. 11), on which a judgment was entered (R. 12). On appeal, the Circuit Court of Appeals for the Second Circuit reversed this judgment on the ground that the evidence was not sufficient to support the verdict (R. 332).

The petitioner enlisted in the Army on July 14, 1917, and was discharged on April 29, 1919. While in the service he was granted a policy of war-risk

insurance in the sum of $10,000 (R. 2–5), which remained in force until May 31, 1919, by payment of premiums. The petitioner testified that he was injurd in France June 17, 1918, during a bombardment by the explosion of a shell which fell near him while he was on his way from the trenches to a dugout. He suffered a physical injury to his ankle and was thrown down and rendered unconscious by the concussion. He was taken to the post hospital, from which he was discharged in August, 1918. While in the hospital he suffered with weak and dizzy spells (R. 20–21). As soon as he recovered from the injury to his ankle he went back to his company and was given light work in the kitchen, but the "spells" continued (R. 22–23).

After the petitioner's discharge from the Army he returned to his mother's home but did nothing for three or four months (R. 25). He then began to work for a company, rolling logs into vats. After a short time at this work he was changed to lighter duties. He retained this employment during the rest of 1919 and 1920 (R. 26). He was forced to give up this position in 1921 (R. 26, 28), but thereafter he obtained employment as a machinist's helper and laborer with the Central Vermont Railroad (R. 29). He kept this job about a year but lost considerable time (R. 30). From June, 1923, to November, 1923, he worked for the Boston & Maine Railroad, losing considerable time because of his condition (R. 30). He then re-

turned to the Central Vermont Railroad and remained with it until February, 1929, as a laborer and janitor (R. 31).

Dr. Frank B. Hunt, a witness for the petitioner, testified that he treated the petitioner for nervousness, rheumatism, and chronic bronchitis in June, 1920, and that the petitioner made no complaint at that time of having epileptic seizures of any kind. The doctor testified that the petitioner was not totally incapacitated at the time of his examination. (R. 124–126.) Dr. Byron Herman also testified for the petitioner. He stated that he began treating the petitioner for epilepsy about 1926 or 1927 (R. 168). On cross-examination, the doctor was shown the report of a physical examination he made in 1920 and he testified that he had diagnosed the petitioner's illness at that time as rheumatism and laryngitis, and that his degree of vocational handicap was negligible (R. 172–173). The witness also testified that the petitioner was now able to do any sort of work which would not bring him into close contact with machinery (R. 170, 172).

ARGUMENT

The court below held that the evidence was not sufficient to show that the petitioner was totally and permanently disabled on May 31, 1919. The court concluded that (R. 333–334)—

> there was no testimony that when he allowed his policy to lapse his condition was such that it could be said with reasonable certainty

> that he then had epilepsy or that epilepsy would ensue or that for any reason he was then permanently disabled. There was evidence from which a jury might find that, when the plaintiff ceased to pay premiums in May, 1919, he was totally disabled but none from which they might find that his disability was permanent.

We submit that this decision was correct.

The court below correctly held, we submit, that "It is not shown that his condition was incurable in May, 1919, merely because it became so years later" (R. 335). As the court pointed out, other causes may have contributed to the ultimate result. Since there was no evidence that the petitioner was permanently disabled in May, 1919, the verdict of the jury was without support. This conclusion is fortified by the fact that the petitioner was employed during practically all of the ten-year period following the lapse of his policy. Partial disability during that period is not sufficient to show that he was totally and permanently disabled on May 31, 1919.

The petitioner relies on an alleged conflict between the decision in the present case and the decisions in *Tyrakowski* v. *United States,* 50 F. (2d) 766 (C.C.A. 7th), *Bartee* v. *United States,* 60 F. (2d) 247 (C.C.A. 6th), and *United States* v. *Fitzpatrick,* 62 F. (2d) 562 (C.C.A. 10th). These decisions are simply applications of the same general principle as to the sufficiency of the evidence

required to support a verdict as that adopted by the lower court in the instant case. These decisions, as well as the one under consideration, agree that in determining the sufficiency of the evidence, it must be considered and construed in the light most favorable to the plaintiff.

In its essential features this case is not distinguishable from other war-risk insurance cases in which this Court has declined to grant certiorari. *Martin* v. *United States*, 286 U.S. 546; *Nalbantian* v. *United States*, 285 U.S. 536; *Thompson* v. *United States*, No. 902, October Term, 1932, certiorari denied May 29, 1933.

CONCLUSION

We submit that the decision below is correct. The question involved is one of fact and is not of general importance. The petition should be denied.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
ROY ST. LEWIS,
Assistant Attorney General.
ERWIN N. GRISWOLD,
W. CLIFTON STONE,
Attorneys.

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